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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL RIVAS,

Defendant and Appellant.

B224674

(Los Angeles County
Super. Ct. No. BA356462)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed with directions.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Miguel Rivas, appeals from his convictions for first degree burglary (Pen. Code,¹ § 459) and two counts of criminal threats (§ 422) and the finding that a person was present in the dwelling at the time of the burglary. (§ 667.5, subd. (c)(21).) Defendant's sole contention on appeal is that there was insufficient evidence to support his conviction. Apart from directing the preparation of an amended abstract of judgment, we affirm the judgment.

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On May 11, 2009, Hilda² Abarca lived on South Oxford Avenue with Jessica Abarca. Hilda is Jessica's mother. At approximately 3 a.m. on May 11, 2009, Hilda awoke to find defendant lying on top of her. Hilda pushed defendant off the bed to the floor. Hilda then awakened Jessica, who was sleeping in the same bedroom, by yelling that there was a man in the house. Jessica asked defendant what he was doing in her house. Defendant said, "Artemio sent me to collect money for the rent." Defendant said if they did not give him the money, "I'm going to kill you." Defendant then went into the bathroom and closed the door.

Jessica attempted to open the bathroom door. After she knocked on the door for approximately two minutes, defendant walked into the living room. Jessica continued to ask defendant: "What are you doing inside my house? How did you come in?" Defendant said the person identified only as Artemio had a key. Defendant said he opened the door with that key. Jessica told defendant: "We don't know Artemio. We don't owe anybody money, and we don't owe anybody rent." Defendant attempted to leave the apartment. However, Hilda held the front door closed. Hilda was also calling the police. Jessica grabbed at defendant. In response, defendant tried to stop Jessica from grabbing him. Jessica and defendant were pushing each other. Jessica did not know anyone named Artemio. Defendant gave an address and telephone number for

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² For purposes of clarification and out of no disrespect, the victims will hereafter be referred to by their first names.

Artemio. Defendant claimed to have been sent by the person identified only as Artemio to kill Hilda and Jessica. Defendant also mentioned the name of a gang. Defendant said gangsters sent him to kill Hilda and Jessica. Both Jessica and Hilda were afraid for their lives. Jessica believed that someone sent defendant to kill her. Defendant made sense. Defendant smelled of alcohol but was able to move around the apartment. Defendant stumbled a few times. However, he spoke clearly.

Jessica tried to trick defendant by stating: “You’re stupid. My neighbors are cops and they are going to come get you right now.” Defendant responded, “If you do that, I’m going to kill you.” Defendant reached toward his back pocket. Jessica feared defendant had a weapon or a gun. Jessica and Hilda began screaming, grabbing his arms, and held his hands to prevent him from reaching into his pocket. Jessica began hitting defendant in the head and was able to jump on top of him and hold him until the police arrived. Hilda had to unlock the front door to allow the police to enter. When the police arrived, they handcuffed defendant.

Defendant argues there was insufficient evidence to support his first degree burglary conviction. In addition, defendant argues his federal and state constitutional rights to due process were violated because the prosecution failed to prove a union of act and intent at the time of entry. In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: “[We] must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.” (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; *People v. Hovarter* (2008) 44 Cal.4th 983, 996-997; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia, supra*, 443 U.S. at p. 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *Taylor*

v. Stainer, *supra*, 31 F.3d at pp. 908-909.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.) The California Supreme Court has held, “Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’” (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

In this case, the prosecution charged defendant in the information with entering an inhabited dwelling house with the intent to commit larceny and any felony. Defendant was also charged with making criminal threats, a felony, against both Hilda and Jessica. Section 459 provides in part: “Every person who enters any house, room, apartment . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.” Our Supreme Court has held: “[T]he intent to commit *any* felony (or theft) suffices for burglary. (§ 459.) [T]he jury need not unanimously decide, or even be certain, which felony defendant intended as long as it finds beyond a reasonable doubt that he intended some felony. [Citation.]” (*People v. Hughes* (2002) 27 Cal.4th 287, 351; *People v. Horning* (2004) 34 Cal.4th 871, 903; *People v. Russo* (2001) 25 Cal.4th 1124, 1132-1133; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042 [“One may be liable for burglary upon entry with the requisite intent to commit a felony or a theft . . . regardless of whether the felony or theft committed is different from that contemplated at the time of entry, or whether any felony or theft actually is committed”].) Our Supreme Court has held: “““While the existence of the specific intent charged at the time of entering a building is necessary to constitute burglary in order to sustain a conviction, this element is rarely susceptible of direct proof and must usually be inferred from all of the facts and circumstances disclosed by the evidence.” [Citation.]’ [Citation.]” (*People v. Holt* (1997) 15 Cal.4th 619, 670, quoting *People v. Earl* (1973) 29 Cal.App.3d 894, 896,

overruled on another point in *People v. Duran* (1976) 16 Cal.3d 282, 292; *People v. Osegueda* (1984) 163 Cal.App.3d Supp. 25, 29.)

Substantial evidence supported the verdict. Defendant was present in the victims' apartment in the early morning hours as they slept. Defendant had entered without permission. The doors to the apartment were locked. Defendant lay down on top of Hilda awakening her. When confronted by the victims, defendant claimed to have been sent by "Artemio" and gang members to collect rent and to kill Hilda and Jessica. The victims did not know defendant or anyone named Artemio. Moreover, their rent was paid. Defendant fought with Hilda and Jessica and indicated he would kill them if they notified the police. Defendant argues that because his conduct was so "weird, bizarre, and inexplicable," the jury could not reasonably find he entered with the intent to commit any crime when he entered the apartment. We disagree. The jurors could reasonably find that defendant unlawfully entered the apartment and intended to commit a theft or other felony.

The trial court orally imposed: three \$30 Penal Code section 1465.8, subdivision (a)(1) court security fees; three \$30 Government Code section 70373, subdivision (a)(1) criminal conviction assessments; a \$10 Penal Code section 1202.5, subdivision (a) fine and related mandatory penalty assessments, the surcharge and penalties in the amount of \$26. The abstract of judgment reflects some but not all of these fees, assessments and fines. Preliminarily, we presume the \$10 Penal Code section 1202.5, subdivision (a) fine was subject to the following: a \$10 Penal Code § 1464, subdivision (a)(1) penalty assessment; a \$7 Government Code section 76000, subdivision (a)(1) penalty assessment; a \$2 Penal Code section 1465.7, subdivision (a) state surcharge; a \$2 Government Code section 76000.5, subdivision (a)(1) penalty assessment; a \$3 Government Code section 70372, subdivision (a)(1) state court construction penalty; a \$1 Government Code section 76104.6, subdivision (a)(1) deoxyribonucleic acid penalty; and a \$1 Government Code section 76104.7, subdivision (a) deoxyribonucleic acid penalty. That totals \$26 as the trial court imposed. (See *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528-1532.) The abstract of judgment should be corrected to include the \$26 in penalty

assessments, the surcharge and penalties. (*People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Hartsell* (1973) 34 Cal.App.3d 8, 14.) The trial court is to actively and personally insure the clerk accurately prepares a corrected amended abstract of judgment which reflects the modifications to the judgment we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

The clerk is to prepare a corrected abstract of judgment which sets forth the imposition of the Penal Code section 1202.5, subdivision (a) fine and related mandatory penalty assessments, the surcharge and penalties as well as the three \$30 Government Code section 70373, subdivision (a)(1) criminal conviction assessments and forward it to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.